

This Opinion Is Not
a Precedent of
the TTAB

Mailed: December 20, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Thorley Industries, LLC

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Serial No. 90703606

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Janik Marcovici and Kyle Light of Perman & Green, LLP,
for Thorley Industries, LLC

Brian Pino, Trademark Examining Attorney,
Law Office 114 (Nicole Nguyen, Managing Attorney).

Before Wellington, Goodman and Coggins, Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Thorley Industries, LLC (“Applicant”) seeks registration on the Principal



Register of the mark:  for the following goods:¹

Baby monitors; electronic timers for use while training infants to settle to sleep and sleep through the night; computer hardware; video cameras; time recording apparatus; downloadable computer application software for mobile phones, namely, software for interfacing with seats, cradles, cribs, bassinets, and infant beds; downloadable electronic publications in the nature of research articles and journal articles for providing

¹ Application Serial No. 90703606 was filed on May 11, 2021, based on Applicant’s allegation of various dates of first use in commerce of the mark for the various classes of goods, pursuant to Section 1(a) of the Trademark Act.

information in the field of children's products and parental use of children's products, in Class 9;

Seats, cradles, cribs, bassinets, and infant beds for medical use, in Class 10;

Bath tubs, wash basins being part of sanitary installation; bathing accessories, namely, safety bath spout covers with integrated water temperature measurement and display devices, in Class 11;

Car seats and carriers in the nature of safety seats for use in cars, all for infants and children; travel systems for infants and children, namely, combination strollers, car seats, car seat bases, and carriers in the nature of safety seats for use in cars; accessories for car seats, baby carriers and travel systems all for infants and children, namely, protective shields and covers for children's car seats; strollers; structural parts and accessories specifically adapted for use with strollers, namely, seat pads in the nature of fitted seat covers, neck and head supports, hoods, canopies, and rain covers specially adapted for strollers, storage bags specially adapted to hang in strollers to store child toys, wheel covers, sun shields, insect netting specially adapted to cover strollers, caddies, trays and holders specially adapted to fit on strollers, internal restraint safety belts, and child restraints, in Class 12;

Bassinets; beds for children; cribs; playpens; play-yards; high chairs; high chair accessories, namely, contoured seat pads, and spill pads that are specially adapted to attach to high chairs; decorative mobiles; baby head and neck support cushions; baby and infant bouncers; seats in the nature of infant cradles and cradles that are powered and programmed to move in multiple axes to soothe or entertain infants and small children; fitted fabric covers for baby seats, in Class 20;

Children's dishes; household storage containers for baby food; baby bath tubs, in Class 21;

Baby bedding, namely, mattresses and sheets, in Class 24; and

Children's multiple activity toys; plush toys; baby swings; baby swing accessories specifically adapted for use with baby swings, namely, seat pads, neck and head supports, carrying bags, fabric and net covers that attach to swings; mobiles for children, in Class 28.

The Examining Attorney refused registration of the mark for all classes on the basis that the specimens of use are unacceptable under Trademark Act (“the Act”) §§ 1 and 45, 15 U.S.C. §§ 1051 and 1127, as promulgated in Trademark Rules 2.34(a)(1)(iv) and 2.56(a), 37 C.F.R. §§ 2.34(a)(1)(iv) and 2.56(a). Specifically, the Examining Attorney argues that “the proposed 4 and design mark shown in the drawing does not make a separate and distinct commercial impression from the 4MOMS and design as it appears on the specimens” and, accordingly, “the 4MOMS and design on the specimen[s] do not show the 4 and design mark in the drawing in use in commerce.”²

Applicant filed a notice of appeal with the Board and a request for reconsideration. The Examining Attorney denied the request. The appeal resumed and is fully briefed. We affirm the refusal to register.

I. Applicable Law and Discussion

Trademark Act Section 1(a)(1), 15 U.S.C. § 1051(a)(1), requires an applicant to submit a specimen of its mark as used in commerce. *See also* Trademark Rule 2.56(a), 37 C.F.R. § 2.56(a) (“An application under section 1(a) of the Act . . . must [] include one specimen per class showing the mark as used on or in connection with the goods or services.”). An applicant is also required to submit a drawing, which “must be a substantially exact representation of the mark as used on or in connection with the goods and/or services.” Trademark Rule 2.51(a), 37 C.F.R. § 2.51(a). The use of the term “substantially” allows for some

² 8 TTABVUE 2.

inconsequential variations from the representation in the drawing. *In re Hacot-Colombier*, 105 F.3d 616, 41 USPQ2d 1523, 1525 (Fed. Cir. 1997) (“The regulation’s term ‘substantially’ permits some inconsequential variation from the ‘exact representation’ standard.”).

The sole issue before us whether the mark as it appears in the drawing in the application is a substantially exact representation of the mark on the specimen or if it is a ‘mutilation’ thereof. *See* 37 C.F.R. § 2.51(a); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 807.12(a) (2023). That is, when a proposed mark, as represented in the drawing, does not constitute the complete mark, it is sometimes referred to as a “mutilation” of the mark. This term indicates that essential and integral subject matter is missing from the drawing. TMEP § 807.12(d). As discussed by our primary reviewing court in *In re Chem. Dynamics Inc.*, 839 F.2d 1569, 5 USPQ2d 1828 (Fed. Cir. 1988), the issue of mutilation “all boils down to a judgment as to whether that designation for which registration is sought comprises a separate and distinct ‘trademark’ in and of itself.” *Id.* at 1829, quoting 1 J.T. McCarthy, TRADEMARKS AND UNFAIR COMPETITION § 19:17 (2d ed. 1984).

Again, the mark Applicant seeks to register is depicted in the drawing as:



The following are representative excerpts from the specimens Applicant submitted for purposes of demonstrating use of the proposed mark in commerce:



4moms

4moms Lifestyle

★★★★★ 1,346

Everyone

You don't have any devices

Add to Wishlist

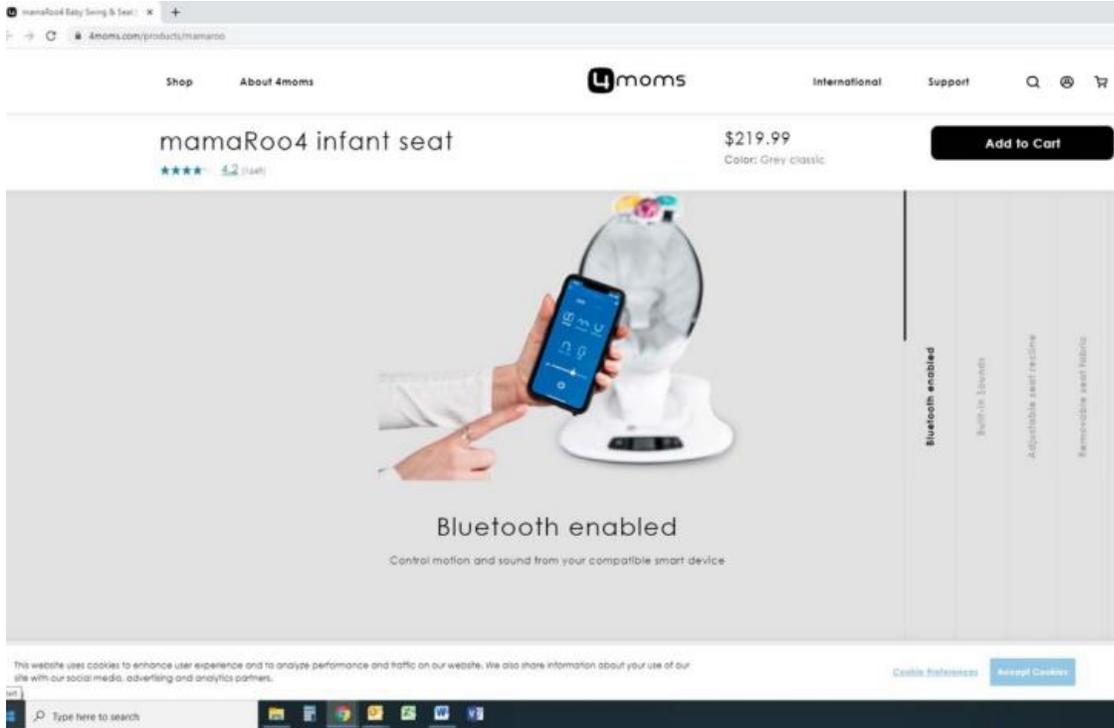
Install



4moms makes parents' lives easier with its dramatically better, high-tech baby gear. The 4moms app gives parents the option to customize their 4moms product experience with unique features like:

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³ Original specimen, submitted May 11, 2021, at TSDR p. 2.



⁴ Original specimen, submitted May 11, 2021, at TSDR p. 5.

4moms

Start typing your search...

4moms > mamaRoo® infant seat > mamaRoo infant seat - Getting Started

Instruction Manuals for the mamaRoo infant seat

Model 4M-005

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- mamaRoo infant seat Product Registration
- mamaRoo infant seat Age/Weight limit
- mamaRoo infant seat Assembly & Disassembly
- How to pair your mamaRoo®4 infant seat with the 4moms® app
- Instruction Manuals for the mamaRoo infant seat**

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4MOMS + NATIONAL PERINATAL ASSOCIATION QUALITY ASSURANCE PROJECT OVERVIEW

A preliminary study shows that using the 4moms® mamaRoo® infant seat with babies affected by Neonatal Abstinence Syndrome (NAS) in the NICU increased their comfort level.

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⁵ Original specimen, submitted May 11, 2021, at TSDR p. 6.

⁶ Original specimen, submitted May 11, 2021, at TSDR p. 7.



As can be seen from these excerpts, the proposed mark  is always followed immediately by the term “moms” (in all lower-case, stylized lettering).

The Examining Attorney argues that because the proposed mark is immediately followed by the word “moms,” it is “physically joined,” as well as

⁷ Original specimen, submitted May 11, 2021, at TSDR p. 8.

being “conceptually connected.”⁸ As the Examining Attorney explains, “the 4 in the proposed mark functions as the word ‘for’ on the specimens” thus creating a single suggestive message that Applicant’s goods are “for moms.”⁹ As illustrated in the specimen materials, Applicant’s goods are intended to “make parents’ lives easier” and provide “parents the option to customize their 4moms product experience.”¹⁰

In making our determination whether the proposed mark comprises “a separate and distinct ‘trademark’ in and of itself,” *Chem. Dynamics*, 5 USPQ2d at 1829, we look to the specific facts of this case, *see Institut Nat’l des Appellations D’Origine v. Vintners Int’l. Co.*, 954 F.2d 1574, 22 USPQ2d 1190, 1197 (Fed. Cir. 1992) (mutilation “must be decided on the facts of each case”), but are guided by previous Board decisions involving similar scenarios. In *In re Semans*, 193 USPQ 727, 728-29 (TTAB 1976), the proposed mark KRAZY for food seasoning appeared on the specimen of use directly followed by the wording MIXED-UP, all on the same line and in the same script. The Board, in *Semans*, stated:

[Such use on the labels] would tend to suggest that applicant has made no effort to emphasize any one portion of this grouping. ... Thus, as we view it, KRAZY MIXED-UP is a unitary phrase, of which KRAZY is an integral part, it is used by applicant as a single composite mark, it is a play on a unitary colloquial expression, and there is nothing in the record to suggest that customers and prospective purchasers of applicant’s goods separate the phrase into component parts and utilize KRAZY alone to call for and refer to the goods.

⁸ 8 TTABVUE 3.

⁹ 8 TTABVUE 3.

¹⁰ Original specimen, submitted May 11, 2021, at TSDR pp. 2 and 9.

... on both a visual and connot[at]ive viewpoint, KRAZY is used merely as a part of the unitary phrase KRAZY MIXED-UP, and that, as used, it does not function as a trademark in and of itself.

Id. at 729.

In *In re Yale Sportswear Corp.*, 88 USPQ2d 1121 (TTAB 2008), the Board affirmed a refusal based on applicant's proposed mark UPPER 90 not being substantially exact to the designation depicted in the specimens where a degree symbol immediately followed the proposed mark. The Board explained that "[w]ithout the degree symbol, it is unclear what the '90' in the drawing might refer to. However, when viewed on applicant's specimens of use, the degree symbol in the mark would clearly be perceived as modifying the preceding number, making clear that its meaning is 'ninety degrees,' indicating that it refers to either an angle or a temperature. As such, the mark might possibly suggest to the potential purchaser that applicant's sports clothing is made for playing in especially hot weather, or indeed that the mark refers to an angle, as applicant contends." *Id.* at 1123-24.

The circumstances in the present appeal are very similar to those in the *Semans* and *Yale Sportswear* decisions. That is, the proposed mark  is depicted in the specimens as part of a unitary phrase and cannot be regarded as a separable element creating a separate and distinct commercial impression. Consumers will not view the proposed mark , by itself, as a

separable mark. We agree with the Examining Attorney that because  is immediately followed by the word “moms,” consumers will immediately understand the combination as one suggestive expression, i.e., “for moms.” This is especially so given the context – the goods are directed to parents of children and the term 4MOMS, without design or stylization, frequently appears throughout Applicant’s specimen materials. Consumers of Applicant’s goods are thus conditioned to encounter the proposed mark immediately followed by “moms” and that  is used in combination with “moms” to convey the suggestive expression “for moms.”

For the aforementioned reasons, we find Applicant’s specimens are unacceptable because Applicant’s drawing of the mark is not a substantially exact representation of the mark as used in commerce. *See* Trademark Rule 2.51(a).

II. Decision

The refusal to register Applicant’s mark is affirmed.